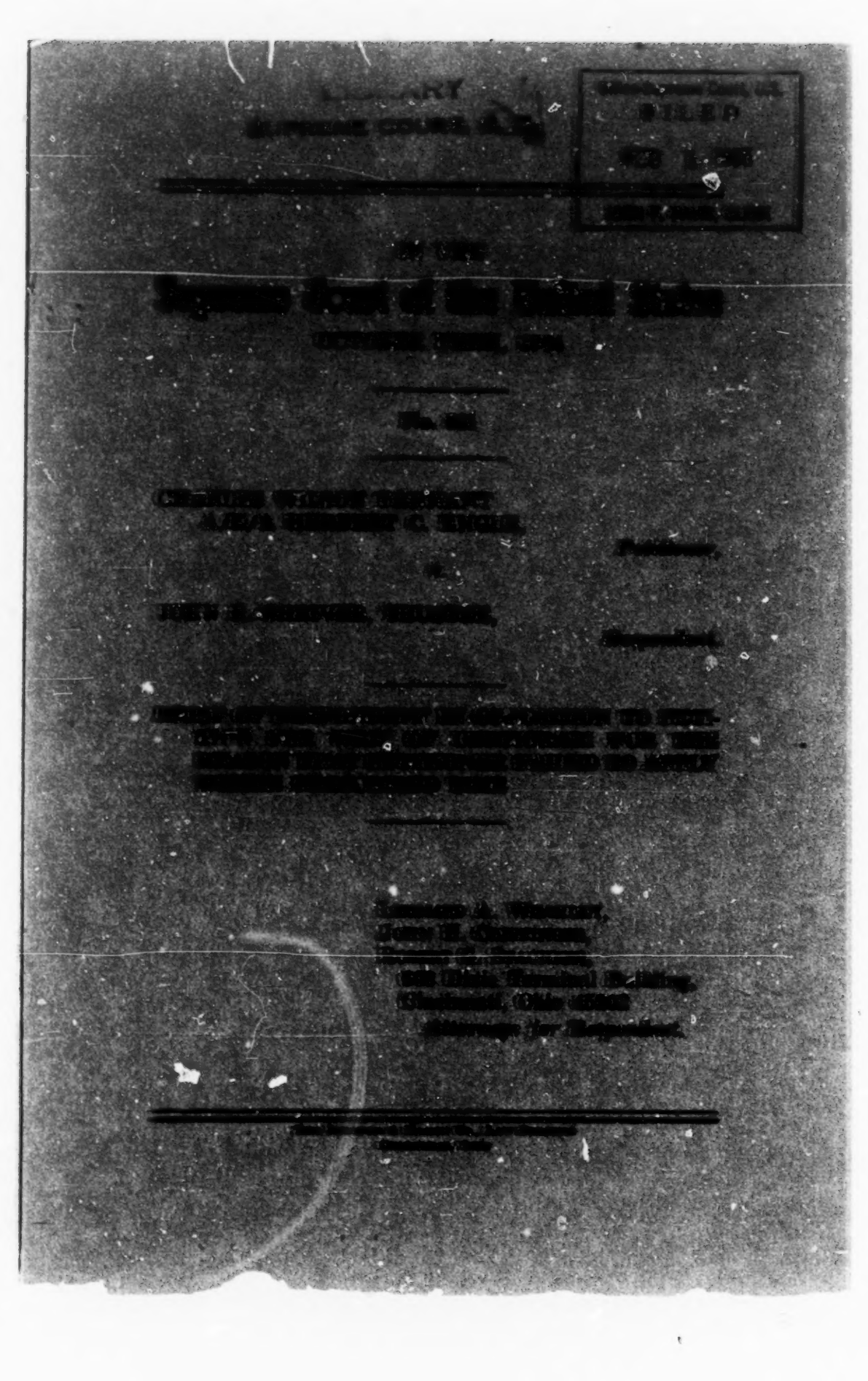

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 811

CHARLES WILSON TENNANT
A/K/A HERBERT C. ENGLE,

Petitioner,

v.

JOHN R. SHRIVER, TRUSTEE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR THE REASON THAT PETITIONER FAILED TO APPLY WITHIN PRESCRIBED TIME

QUESTION PRESENTED

The sole question presented by Respondent at this time is whether this Court has jurisdiction to entertain the untimely Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

On September 21, 1964 the Sixth Circuit Court of Appeals rendered an opinion and entered judgment in the case. The opinion is reported in 336 F. 2d 807. Thereafter, on December 17, 1964 Petitioner submitted to this

Court by telegram a request for an extension of time in which to apply for a writ of certiorari. Mr. Justice Goldberg extended the time from December 21, 1964 to January 4, 1965. The Petition for Writ of Certiorari, however, was not filed by Petitioner until January 6, 1965, which date was after the expiration of the extension period granted by this Court, and, of course, more than ninety (90) days since the entry of the judgment by the Court of Appeals. No other application for an extension of time has been made to this Court and no other extension has been granted by a Justice of this Court in the case.

Petitioner failed to notify Respondent that Mr. Justice Goldberg granted an extension of time to January 4, 1965 even though Rule 34.4 of this Court explicitly required that prompt notification of such action be given to Respondent by Petitioner. Moreover, Petitioner did not comply with Rule 21.2 of this Court which required that he notify Respondent, on a form supplied by the Clerk, of the date of filing, of the docket number of the case, and of the contents of the record filed with the Court. This information had to be obtained from the Clerk of this Court by Respondent.

ARGUMENT

The time fixed by statute for filing a petition for certiorari in a case such as the instant one is set forth in 28 U.S.C. Sec. 2101(c) (1949) as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within ninety days after the entry of such judgment or decree.* A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." (Emphasis added)

Rule 22.3 of this Court provides that the petition for certiorari shall be deemed in time when it and the certified record are filed with the Clerk "within the time prescribed by law." In addition to Rule 22.3 the other applicable Rule of this Court to the question presented is Rule 34.2, which reads as follows:

> "Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, *an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended.* The clerk will refuse to receive any application for extension sought to be presented after expiration of such period." (Emphasis added)

The purpose of establishing such time limitations was recognized in *Matton Steamboat Co.* v. *Murphy* (1943), 319 U.S. 412, 87 L. Ed. 1483, where the Court, in a per curiam opinion, stated:

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

As early as 1945, in *Commissioner of Int. Rev.* v. *Bedford* (1945), 325 U.S. 283, 89 L. Ed. 1611, this Court expressed its feeling as follows:

> "In these days of rapid communication the statutory allowance of three months [now ninety days] is more than ample for an unsuccessful litigant to determine whether to seek further review." (325 U.S. at 288, 89 L. Ed. at 1616; insert added)

This Court has consistently and uniformly held that it lacks jurisdiction to entertain an untimely petition for writ of certiorari. In *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.* (1952), 344 U.S. 206, 97 L. Ed. 245, Mr. Chief Justice Vinsón delivering the opinion of the Court stated that "the initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law." In denying the petition because the Court lacked jurisdiction, Mr. Chief Justice Vinson further stated at 97 L. Ed. 252-253 (343 U.S. 213):

> ". . . we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. *It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period.*" (Emphasis added)

Likewise, this Court in *Department of Banking* v. *Pink* (1942), 317 U.S. 264, 87 L. Ed. 254, reh. den. (1943), 318 U.S. 802, 87 L. Ed. 1166, for want of jurisdiction, denied the petition for certiorari which was filed more than three months after the entry of the judgment of the state court. On this point it was stated in a per curiam opinion at 87 L. Ed. 256 (317 U.S. 266-267):

> "Accordingly we must deny the petition for certiorari on the ground that it was not filed within the time provided by law."

Accord, United States v. *Lippmann* (1922), 260 U.S. 742, 67 L. Ed. 491; *Rust Land & L. Co.* v. *Jackson* (1919), 250 U.S. 71, 63 L. Ed. 850; *Toledo Scale Co.* v. *Computing Scale Co.* (1922), 261 U.S. 399, 67 L. Ed. 719.

The Petition for Writ of Certiorari in the instant case was filed after January 4, 1965, the last day of the period of extension. No Justice of this Court ever extended the

time for applying for a writ of certiorari beyond January 4, 1965. Furthermore, no application was ever presented by Petitioner to extend the date beyond January 4, 1965. According to the Rules of this Court the period in which Petitioner could have made application for a second extension of time in which to file his petition for certiorari expired on January 4, 1965. Rule 34.2 unequivocably provides that "an application seeking such extension shall be timely if it is presented to the clerk [of the Supreme Court] within the period sought to be extended." With respect to the instant case, a second application of Petitioner for additional time, therefore, had to be presented within the period prior to January 4, 1965, since this date was the termination date of the period in which Petitioner could have "sought to be extended" within the purview of Rule 34.2.

It is clear, therefore, from a perusal of the statute and the Rules of this Court, that the Petition for Writ of Certiorari in the instant case was filed untimely and that the period of time in which Petitioner had to apply for an additional extension has already expired. Consequently, according to the decisions and precedent of this Court, the Court now lacks jurisdiction to entertain the Petition and must deny it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 28, 1965.